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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
NEW YORK AND CUBA MAIL STEAMSHIP Company.
No. 116.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

This was an action brought by the defendant in error in the United States District Court for the Southern District of New York for the recovery of two hundred and forty dollars ($240) alleged to have been expended in the purchase of revenue stamps, which the law of June 13, 1898 (30 Stat., 448), required to be affixed to manifests of cargoes exported from the United States.

A demurrer to the petition was interposed, which was overruled, and the case comes here upon writ of error.

The petition alleges that the defendant in error is a New York corporation, and that James E. Ward & Co. (Incorporated) is the general agent of the petitioner, and that, as such agent, made out and delivered to the collector of the port of New York the outward manifests of the cargoes of the vessels of petitioner required by section 4197 of the Revised Statutes of the United States to be so delivered before the vessel bound for a foreign port or place is granted clearance from a port of the United States. (Rec., p. 2.) The petition directs attention to that portion of the act of June 13, 1898, requiring documentary stamps to be affixed to outward foreign manifests of cargoes, and alleges "that said act being in force, under compulsion and through fear of criminal prosecution, and in order to obtain clearance papers, which could not have been procured without the delivery to the collector of the port of New York of outward foreign manifests of cargo stamped as aforesaid, and without which clearance papers the vessels hereinafter named would have been prevented from sailing or would have become liable for the penalty imposed by section 4197 of the Revised Statutes of the United States, said James E. Ward & Co., for and on behalf of your petitioner, and as such general agents as aforesaid, purchased and affixed to said outward foreign manifests of cargo and canceled internal-revenue documentary stamps of the United States of the face value of two hundred and forty dollars. * * *"

The petition further discloses "that said stamps were purchased from Walter H. Stiner, a dealer in

internal-revenue stamps at 27 William street, New York City, on various days subsequent to January 1, 1900." That "on or about the 13th day of November, 1901, said James E. Ward & Co., for and on behalf of your petitioner and as such general agent as aforesaid, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, made an application in writing to the United States Commissioner of Internal Revenue to remit, refund, and pay back to said James E. Ward & Co., as such agents as aforesaid, the alleged tax on said outward manifests of cargo, on the ground that the provisions of said war-revenue act imposing an internal-revenue tax upon manifests for clearance of cargoes of goods exported from a port or place in the United States to any foreign port or place is unconstitutional," and that on or about the 19th day of March, 1902, such application was rejected. (Rec., pp. 3 and 4.)

ARGUMENT.

This action must fail, as the stamps were purchased voluntarily and without protest, and affixed and canceled voluntarily and without protest. (*Chesebrough* v. *The United States*, 192 U. S., 253.)

It is unnecessary to consider the constitutional question raised in this case, since the decision of this court in *Chesebrough* v. *The United States* (*supra*), is decisive on the question of the right of the defendant in error to recover in this action. In that case the petitioner sought to recover money paid for stamps affixed to a

deed as required by the law of June 13, 1898, *supra*, which made it a misdemeanor for any person or persons to make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever without the same being duly stamped as required by law. The petitioner set out section 7 of that law, and averred that the grantee named in the deed was unwilling to accept the deed until the stamps were affixed, and "that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts," etc., purchased the stamps from the United States internal-revenue collector. The petitioner then averred application for refund to the Commissioner of Internal Revenue, and the denial of said application. The demurrer of the United States was sustained, and upon appeal to this court the judgment of the lower court was affirmed.

The Chief Justice, speaking for the court, said:

> The rule is firmly established that taxes voluntarily paid can not be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had,

although, generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.

* * * * *

The stamps in question were purchased from the collector of internal revenue for the Second District of New York, for the purpose of affixing them to a deed of conveyance to the Building Company, but the collector was not informed at the time of purchase of the particular purpose, and no intimation was given him, written or oral, that petitioner claimed that the law requiring such stamps was unconstitutional and that he was making the purchase under duress. The petition did allege that the Building Company was unwilling to accept an unstamped conveyance, and that the stamps were thereupon affixed in order to complete the transaction and obtain the consideration, but if that constituted duress as between Chesebrough and his building company it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law if the law were unconstitutional. But it is said that protest or notice would have made this payment involuntary, and that because something over nineteen months after the

payment petitioner made "a written application" to the Commissioner of Internal Revenue for the amount he had paid for the stamps, the ordinary rule did not apply, inasmuch as such an application was "the statutory equivalent of a common-law protest or notice of suit."

The reference is to section 3220 of the Revised Statutes, which provides that the Commissioner of Internal Revenue, on appeal to him, may remit, refund, and pay back all taxes erroneously or illegally assessed or collected or that appear to have been unjustly assessed or excessive in amount, or in any manner wrongfully collected; and also "repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of suit;" while sections 3226, 3227, and 3228 provide that no suit shall be maintained for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected "until appeal shall have been duly made to the Commissioner of the Internal Revenue," or unless brought within two years after the cause of action accrued; and that the claim for refunding shall be presented to the Commissioner within two years.

The words "until appeal shall have been duly made," appear to us to imply an adverse decision by the collector, at least a compelled payment, or official demand for payment, from which the appeal is taken.

* * * * *

> As we have said, the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal.
>
> It is argued that the provisions of section 3220 for the repayment of judgments against the collector rendered protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute in such circumstances. (Pages 259, 260, 261, 262, and 264.)

The decision and remarks of the court in that case are apposite and determinative in the case under consideration. Here the stamps were purchased by the agent of the petitioner without protest and "from a dealer in internal-revenue stamps" who was not in any sense the agent of the Government so far as the petition discloses.

It is probable that this dealer purchased these stamps under the provisions of section 25 of the act which provided that collectors might sell and deliver stamps in quantities of not less than $100 face value at a discount of 1 per cent. It is inconceivable that a person purchasing stamps from a broker could subsequently

claim the right to maintain a suit against the Government, upon making application to the Commissioner of Internal Revenue for refund upon the ground that the tax had been illegally assessed and collected by the United States. These purchases from this broker continued without protest from the 12th day of April, 1901, to the 29th day of June, 1901, inclusive, and the first intimation that either the collector or the Commissioner of Internal Revenue had that the petitioner was aggrieved was *on the 13th day of November, 1901*, when the petitioner through its agent asked for a refund of the amounts thus voluntarily paid for stamps.

It is respectfully submitted that the judgment of the district court should be reversed.

CHARLES H. ROBB,
Assistant Attorney-General.

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Supreme Court of the United States,

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THE UNITED STATES,
Plaintiff in Error,

vs.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM EDMOND CURTIS.
For Defendant in Error.

HN G. CARLISLE,
Of Counsel.

ENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Plaintiff in Error, AGAINST NEW YORK AND CUBA MAIL STEAMSHIP COMPANY, Defendant in Error.	No. 116.

BRIEF FOR DEFENDANT IN ERROR.

This case comes to this Court upon a writ of error to the District Court of the United States for the Southern District of New York.

The action was brought in November, 1902, by the New York and Cuba Mail Steamship Company to recover the sum of $240, the value of internal revenue stamps which petitioner had been compelled to affix to various outward foreign manifests pursuant to the provisions of the Act of Congress of June 13, 1898, known as the "War Revenue Act." The ground of the action is that the statute imposing such tax was unconstitutional.

The defendant demurred to the petition. The District Court held the statute in question unconstitutional, overruled the demurrer, and gave judg-

ment for the petitioner as prayed for in the petition.

The following is a brief statement of the material facts in the case:

The New York and Cuba Mail Steamship Company is a corporation organized under the laws of the State of New York, and is engaged in the business of the transportation of passengers and freight between New York and Havana, Cuba. Between April 12, 1901, and June 29, 1901, as appears from Exhibit A of the petition (Printed Record, p. 5), petitioner was obliged, in order to secure clearance papers for its vessels, to affix to the outward foreign manifests of the cargo of the vessels internal revenue stamps of the face value of $240, pursuant to the provisions of the Act of Congress of June 13, 1898, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes."

30 Stat. at Large, Chap. 448, p. 448.

These stamps, as stated in the petition, were purchased, affixed and canceled by the petitioner under compulsion and through fear of criminal prosecution, and in order to obtain clearance papers which could not have been procured without delivery to the Collector of the Port of New York of outward foreign manifests of cargo stamped as aforesaid, and without which clearance papers the vessels hereinafter named would have been prevented from sailing or would have become liable for the penalty imposed by Section 4197 of the Revised Statutes of the United States.

All the stamps so affixed were purchased subsequent to January, 1900.

Subsequently, on or about the 13th day of November, 1901, pursuant to, and within the time, and in the manner provided by the Revised Statutes of the United States, and the Act of May 12, 1900 (31 Stat. at Large, Chap. 393, p. 177), petitioner duly made application to the Commissioner of Internal Revenue

for the refund of said $240 so expended by it in the purchase of stamps affixed to such export manifests, on the ground that said stamp duty was unconstitutional and void, being in violation of Article I, Section 9, Clause 5 of the Constitution of the United States, which provides that

> " no tax or duty shall be laid on articles ex-
> " ported from any state."

Its application to the Commissioner of Internal Revenue having been denied, the petitioner brought this action against the United States pursuant to the provisions of Section 2 of the Act of Congress of March 3, 1887, entitled: " An act to provide for the " bringing of suits against the government of the " United States " (24 Stat. at Large, 505), commonly known as the Tucker Act.

THE STATUTE.

The portions of the Act of June 13, 1898, material for the consideration of this case are as follows:

> " SEC. 6. That on and after the first day of
> " July, eighteen hundred and ninety-eight,
> " there shall be levied, collected, and paid,
> " for and in respect of the several bonds, de-
> " bentures, or certificates of stock and of in-
> " debtedness, and other documents, instru-
> " ments, matters and things mentioned and
> " described in Schedule A of this Act, or for
> " or in respect of the vellum, parchment, or
> " paper upon which such instruments, mat-
> " ters, or things, or any of them, shall be
> " written or printed by any person or persons,
> " or party who shall make, sign, or issue the
> " same, or for whose use or benefit the same
> " shall be made, signed, or issued, the several
> " taxes or sums of money set down in figures
> " against the same, respectively, or other-
> " wise specified or set forth in the said
> " schedule."
>
> * * * * *

"SEC. 7. That if any person or persons "shall make, sign or issue, or cause to be "made, signed, or issued, any instrument, "document, or paper of any kind or descrip- "tion whatsoever, without the same being "duly stamped for denoting the tax hereby "imposed thereon, or without having there- "upon an adhesive stamp to denote said tax, "such person or persons shall be deemed "guilty of a misdemeanor, and upon convic- "tion thereof shall pay a fine of not more "than one hundred dollars, at the discretion "of the court, and such instrument, docu- "ment, or paper, as aforesaid, shall not be "competent evidence in any court."

"SCHEDULE A.

"STAMP TAXES.

"Manifest for custom house entry or "clearance of the cargo of any ship, vessel, "or steamer for a foreign port—

"If the registered tonnage of such ship, "vessel, or steamer does not exceed three "hundred tons, one dollar.

"Exceeding three hundred tons, and not "exceeding six hundred tons, three dollars.

"Exceeding six hundred tons, five dol- "lars."

* * * * * *

"Provided that the stamp duties imposed "by the foregoing schedules on manifests, "bills of lading and passage tickets shall not "apply to steamboats or other vessels plying "between ports of the United States and "ports in British North America."

ARGUMENT.

POINT I.

The provision of the Act of Congress of June 13, 1898, entitled "An "Act to provide ways and means to "meet war expenditures, and for "other purposes," purporting to impose a stamp duty upon export manifests, is unconstitutional, as undertaking to lay a tax or duty on exports in violation of Article I., Section 9, Clause 5 of the Constitution of the United States, and the duties represented by the Internal Revenue stamps, which petitioner was compelled to affix to export manifests, were, therefore, wrongfully collected, and the money paid by petitioner for said stamps unlawfully exacted.

The unconstitutionality of this stamp duty on export manifests was settled by the decision of this Court in the case of *Fairbank* v. *United States*, 181 U. S., 283. The Court, in that case, held that the stamp duty of ten cents on every export bill of lading was unconstitutional, being a tax on exports, and this decision is, we submit, conclusive in favor of the petitioner in the case at bar.

The tax levied by requiring internal revenue stamps to be affixed to export manifests is a tax on identically the same goods *aggregated* which are taxed *separately* by requiring internal revenue stamps on every export bill of lading. The Fairbank case having held that such a tax on the separate exports is unconstitutional, it follows neces-

sarily that it is also unconstitutional to tax identically the same goods *aggregated*.

All the reasoning of the Court leading to the conclusion that the stamp duty on bills of lading was unconstitutional leads to the same conclusion, in respect to the stamp duty on export manifests, and, if anything, shows that the latter is even more clearly unconstitutional than the former; for, while bills of lading are only conveniences in connection with the exportation of goods, the law has made exportation without manifests impossible, and, therefore, if a stamp duty on export bills of lading is an unconstitutional burden on exportation, a stamp duty on export manifests is even more clearly so. Revenue cannot be collected from exports by changing the form of the tax from a tax on the article exported to a tax on the manifest, which is made by law a prerequisite to the exportation.

The language of the learned judge who heard this case in the Court below is so pertinent and convincing that we beg to quote from his opinion at some length. He says:

> "I am unable to see any difference in prin-
> "ciple between a stamp tax on a manifest
> "and a stamp tax on a bill of lading. A
> "manifest is a declaration of the entire cargo;
> "a bill of lading is a declaration of a specific
> "part of the cargo. A manifest is essentially
> "a summary of all the bills of lading. If
> "there is any distinction, it seems to me that
> "the constitutional prohibition of a tax on a
> "foreign bill of lading applies with still
> "greater force to a tax on a manifest. Pre-
> "vious to the Harter Act, there was, so far
> "as I am aware, no statute of the United
> "States requiring bills of lading to be given.
> "They were universally given, but they were
> "a mere matter of business convenience, and
> "were based exclusively on contract. The
> "statutes of the United States, however,
> "have always required that a sworn manifest
> "be furnished by the master upon the clear-
> "ance of any vessel from this country for a
> "foreign port (U. S. R. S., Sec. 4197). A

"manifest is one of the ship's papers, which "must be presented to the collector upon the "entry of the vessel into the United States "(U. S. R. S., Sec. 2790). It is a part of the "ship's papers, essential, on all voyages, for "the protection of the ship and the owners of "the cargo, which it is the duty of a master "to take on board and carefully preserve (2 "Parsons on Shipping, p. 3). A voyage made "without the regular ship's paper is presum-"ably illegal. In case of a seizure in time of "war, the absence of ship's papers is pre-"sumptively an adequate ground for condem-"nation (2 Parsons on Shipping, 476). Prize "cases, when no claimant appears, are "ordinarily heard upon the ship's papers "and the evidence taken in preparatory "(2 Parsons on Shipping, 473). Any "concealment of spoliation of ship's papers "is a fact of great weight in prize cases "(2 Parsons on Shipping, 475). In short, "while a bill of lading is ordinarily merely a "convenient commercial instrument, a mani-"fest of the cargo is absolutely essential to "the exportation of property in vessels at all. "Congress could absolutely put an end to "any exportation whatever by a sufficiently "high tax on manifests, if it had the power "to impose such a tax. If, therefore, a "stamp tax on a bill of lading is a tax upon "the property exported, a stamp tax on a "manifest seems to me to be still more clearly "such a tax."

No stamp duty on export manifests is collected, if the ship sails in ballast.

Treas. Dec., 1898, Vol. II., p. 97, No. 19,672.

Treas. Dec., 1898, Vol. II., p. 115, No. 19,691, subd. 33.

This, we submit, shows clearly that the stamp duty here in question is a burden imposed on the exportation of articles of merchandise, which, under the constitution, should be free therefrom. It is imposed solely because the articles are exported.

There is some reference to the duties on export manifests in the prevailing opinion in *Fairbank* v. *U. S.*, *supra*, with an express disclaimer, however, of any intention to decide anything whatever with respect to them. The passage alluded to reads as follows:

> "Again, it is said that if this stamp duty "on foreign bills of lading cannot be sus- "tained it will follow that tonnage taxes and "stamp duties on manifests must also fall. "The validity of such taxes is not before us "for determination, and, therefore, we must "decline to express any opinion thereon, and "yet it may be not improper to say that even "if the suggested result should follow it fur- "nishes no reason for not recognizing that "which in our judgment is the true construc- "tion of the constitutional limitation. Ming- "ling in one statute two or three unconstitu- "tional taxes cannot be held operative to vali- "date either one, and if the reasoning we have "stated and followed in reaching the conclu- "sion in this case shall also lead to the result "that such taxes are invalid, it of itself does "not weaken the force of the reasoning or "justify us in departing from its conclusions. "But we may be permitted to suggest, with- "out deciding, that there may be a valid dif- "ference as indicated by the decisions of this "Court in respect to interstate commerce. It "has been distinctly held that no state could "by a license or otherwise impose a burden "on the business of interstate commerce. "*Pickard* v. *Pullman Southern Car Co.*, 117 "U. S., 34, and cases cited in the opinion. "And yet that decision was followed by de- "cisions that it might tax the vehicles "and property employed in interstate "commerce so long and so far as they "were a part of the property of the "State. *Pullman's Palace Car Co.* v. *Penn- "sylvania*, 141 U. S., 18, and cases "cited in the opinion. This difference may "have significance in respect to these other "taxes. As heretofore said, we do not de- "cide the question, but only make these sug- "gestions to indicate that the matter has been "considered."

A careful reading of this paragraph of the Fairbank opinion will, however, show that the possible distinction which the Court there suggests is not between stamp *duties* on bills of lading and stamp *duties* on manifests, but between stamp *duties* and tonnage *taxes*. After speaking in the first sentence of stamp *duties* and tonnage *taxes*, the Court continues, in the second sentence:

> " The validity of such *taxes* (meaning, it is
> " submitted, tonnage taxes) is not before us
> " for determination." * * *

It is clear, therefore, that the distinction which the Court suggests, based on the decisions in respect to interstate commerce, is between stamp *duties* on the one hand, and tonnage *taxes* on the other, and does not relate to the stamp duties on export manifests. A tonnage tax collected on the vessel, whether it enters in ballast or with a cargo, might, perhaps, be regarded as analogous to a tax imposed by a State on

> " vehicles and property employed in interstate
> " commerce, so long and so far as they are
> " part of the property of the State."

It cannot be supposed, however, that the Court considered a stamp duty on manifests analogous to such a State tax. For, obviously, the stamp duty on manifests is not a tax on the vessel as property within the United States, since it is not payable in the case of a vessel sailing in ballast or to a domestic port, but only in the case of vessels carrying cargoes destined for foreign ports. No distinction can be drawn between stamp duties on export bills of lading and stamp duties on export manifests, on the ground that the latter are in the nature of a tax on the vehicles and property employed in the exportation, as distinguished from a tax on such exportation itself.

In the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, mentioned on page 306 of the Fairbank opinion, Pullman's

Palace Car Co. had continuously had one hundred cars in the State of Pennsylvania, and the Court sustained a State tax on the proportion of the company's capital so employed within the State, on the ground that it was a tax on property actually within the jurisdiction of the State, and without any discrimination on account of its being used or employed in interstate commerce. The decision in that case clearly depended on the fact that the property engaged in interstate commerce, which was actually within the State, was taxed in the same way as other property within the jurisdiction of the State. There is no doubt that any discriminative burden on property employed in interstate commerce would be invalid.

Walling v. *Michigan*, 116 U. S., 446.
Welton v. *Missouri*, 91 U. S., 275.
Hinson v. *Lott*, 8 Wall., 148.
Woodruff v. *Parham*, 8 Wall., 123.
Machine Co. v. *Gage*, 100 U. S., 676.

Now, obviously, the stamp duty on manifests does not come within the case of *Pullman's Palace Car Co.* v *Pennsylvania* (*supra*), as a tax on the vessel as property within the United States; for it is not payable in the case of vessels sailing in ballast, but only in the case of vesels carrying cargoes to foreign ports; and it is, moreover, not payable if the vessel remained in the waters of the United States. *The stamp duty on export manifests is collected only when an exportation of goods takes place, and is therefore clearly a tax on such exportation, in violation of the Constitution of the United States.* It cannot be defended as a tax on the *ships*, rather than the cargo, as property, since by discriminating against ships engaged in exportation, a burden is imposed on such exportation, which, under the Fairbank decision, is unconstitutional.

It must be noted, however, that even if there were no discrimination between vessels engaged in exportation and others, any Federal tax on the vessels

as property within the United States would be a direct tax, and therefore unconstitutional, unless apportioned among the several States according to their respective numbers (Constitution, Art. I., Sec. 2; Art. I., Sec. 9).

So far as tonnage taxes are concerned, all fears on the part of the Government that they must fall also if the stamp duties on export manifests are held unconstitutional, as taxes on exports, should be dispelled by recalling the fact that the tonnage taxes exacted by Congress are all taxes paid for *entering* vessels in the United States, and, of course, the constitutional provision as to taxing exports can have no bearing upon the question.

Having thus shown that on the reasoning of the prevailing opinion in *Fairbank* v. *United States*, the stamp duty on export manifests is unconstitutional, it merely remains to point out that the reasoning in the dissenting opinion, which attempted to sustain the tax on export bills of lading, is wholly inapplicable to the stamp duty on manifests, graduated as it is according to the registered tonnage of the vessel. The dissenting opinion held that the ten cents duty on bills of lading is a tax for and in respect of the paper on which they are written or printed, stating that if the tax had been graduated there would be ground for holding that the purpose and necessary result is a tax on the property exported and on exportation (p. 317). Obviously, if the stamp duty on manifests was a tax on the paper used, there would be no reason why it should not be the same on all manifests without regard to the tonnage of the ship which indicates its capacity for carrying cargo and fixes the amount of the tax. By graduating the tax on outward foreign manifests according to the tonnage of the vessels, Congress roughly imposed it according to the quantity of goods exported, a circumstance which, even in the view of the Justices composing the minority in the Fairbank case, would make the tax in purpose and effect a tax on the property exported.

POINT II.

The payment of the duties represented by the Internal Revenue stamps affixed by petitioner to export manifests was made involuntarily and under compulsion, and can, therefore, be recovered back.

It is well settled that taxes voluntarily paid cannot be recovered back, unless such repayment is expressly directed by some statutory enactment.

In *Chesebrough* v. *U. S.*, 192 U. S., 253, this Court held that a purchase of internal revenue stamps for the purpose of affixing them to a conveyance of real estate pursuant to a contract of sale was voluntary.

The Chief Justice, delivering the opinion of the Court, said:

> "The rule is firmly established that taxes "voluntarily paid cannot be recovered back, "and payments with knowledge and without "compulsion are voluntary. At the same "time, when taxes are paid under protest "that they are being illegally exacted, or with "notice that the payer contends that they "are illegal and intends to institute suit to "compel their repayment, a recovery in such "a suit may, on occasion, be had, although "generally speaking, even a protest or notice "will not avail if the payment be made vol-"untarily with full knowledge of all the cir-"cumstances, and without any coercion by "the actual or threatened exercise of power "possessed, or supposed to be possessed, by "the party exacting or receiving the pay-"ment, over the person or property of the "party making the payment, from which "the latter has no other means of immediate "relief than such payment."

The only semblance of such coercion in the Chesebrough case was the fact that the purchaser

was unwilling to accept an unstamped conveyance, and, as to that, this Court very pertinently remarked:

> " The petition did allege that the Building
> " Company was unwilling to accept an un-
> " stamped conveyance and that the stamps
> " were thereupon affixed in order to complete
> " the transaction and obtain the considera-
> " tion, but if that constituted duress as be-
> " tween Chesebrough and his building com-
> " pany it was a matter with which the col-
> " lector had nothing to do."

The distinction between the Chesebrough case and the case at bar is obvious. In the case at bar, a statute of the United States prevented the petitioner's vessels from obtaining a clearance and sailing for a foreign port, unless the internal revenue stamps in question were purchased and affixed, and this constituted coercion or duress, not as between the petitioner and some third party, but as between the petitioner and the very authorities which demanded and compelled the payment of the tax. Said statute of the United States reads as follows:

> " *Section 4197:* The master or person hav-
> " ing the charge or command of any vessel
> " bound to a foreign port, shall deliver to the
> " collector of the district from which such
> " vessel is about to depart, a manifest of all
> " the cargo on board the same, and the value
> " thereof, by him subscribed, and shall
> " swear to the truth thereof; whereupon
> " the collector shall grant a clearance for
> " such vessel and her cargo, but with-
> " out specifying the particulars thereof
> " in the clearance, unless required by the
> " master or other person having the charge
> " or command of such vessel so to do.
> " If any vessel bound to a foreign port de-
> " parts on her voyage to such foreign port
> " without delivering such manifest and ob-
> " taining a clearance, as hereby required, the
> " master or other person having the charge or

" command of such vessel shall be liable to a " penalty of five hundred dollars for every " such offense" (Section 4197, Revised Statutes of the United States).

The following allegations of the petition, which the demurrer admits, clearly show that the payment in the case at bar was involuntary:

* * * * * *

" SECOND. That James E. Ward & Com- " pany, incorporated, is the general agent of " petitioner, and that, as such agent, said " James E. Ward & Company, for and on be- " half of your petitioner, made out and de- " livered to the Collector of the Port of New " York the *outward foreign manifests* of the " cargoes of the vessels of petitioner *required* " *by Section 4197 of the Revised Statutes of* " *the United States*, to be so delivered *before* " *the vessel* bound for a foreign port or place " *is granted clearance from a port of the* " *United States*."

* * * * * *

" That said act being in force, under com- " pulsion and through fear of criminal prose- " cution, *and in order to obtain clearance* " *papers which could not have been procured* " *without the delivery to the Collector of the* " *Port of New York of outward foreign mani-* " *fests of cargo stamped as aforesaid, and* " *without which clearance papers the vessels* " *hereinafter named would have been pre-* " *vented from sailing*, or would have become " liable for the penalty imposed by Section " 4197 of the Revised Statutes of the United " States, said James E. Ward & Company, " for and on behalf of your petitioner, and as " such general agents as aforesaid, purchased " and affixed to the said outward foreign " manifests of cargo and cancelled Internal " Revenue documentary stamps of the United " States of the face value of two hundred and " forty dollars ($240)." * * *

There was, therefore, in the case at bar, coercion by the threatened exercise of power possessed by the Government over the property of the person making the payment of the tax, the only means of immediate relief; and this, according to the language in the Chesebrough case, made the payment involuntary.

It makes no difference whether the coercion was in connection with the purchase or in connection with the affixing of the stamps, for, as long as the stamps were not affixed, they were as good as money in the petitioner's hands, for he could have had them redeemed under the act of May 12, 1900, "as stamps for which the owner may have no use." By compelling the petitioner to use the stamps he was compelled to pay the duties represented thereby.

The payment was involuntary and should be recovered back.

POINT III.

This action being based upon the act of May 12, 1900, and not the provisions of the Revised Statutes discussed in the Chesebrough case, neither protest nor duress in connection with the payment of the duties is necessary to sustain the action.

The Act of Congress of May 12, 1900, Chapter 393, entitled "An Act authorizing the Commissioner of Internal Revenue to redeem or make allowance for internal revenue stamps," provides as follows:

> "That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon

> " receipt of satisfactory evidence of the facts,
> " make allowance for or redeem such of the
> " stamps, issued under authority of law, to
> " denote the payment of any internal revenue
> " tax, as may have been spoiled, destroyed or
> " rendered useless or unfit for the purpose in-
> " tended, or for which the owner may have
> " no use, or which through mistake may have
> " been improperly or unnecessarily used, or
> " where the rates or duties represented
> " thereby have been excessive in amount,
> " paid in error, or in any manner wrongfully
> " collected." * * *

This act says nothing about protest or compulsion. In most of the instances enumerated in it there could be no question of duress or protest; it is inconceivable that there should be any protest or duress in the case where stamps are spoiled, destroyed or otherwise rendered useless or where the owner has no use for them, or where they have, "through mistake, been improperly or erroneously used or where the rates or duties represented thereby have been excessive in amount, paid in error, *or in any manner wrongfully collected.*"

Nor does this act of May 12, 1900, use the word "appeal," as does Section 3220 of the Revised Statutes, which, as is suggested in the opinion of the Chesebrough case, would imply an adverse decision by the collector, from which the appeal is taken.

If internal revenue stamps have been improperly or unnecessarily used, even by mistake of the purchaser himself, though purchased without any duress or protest, the Commissioner, pursuant to the words of the act, must make allowance therefor. If, in the case at bar, the act of Congress requiring the affixing of stamps to export manifests was unconstitutional, the petitioner in affixing such stamps, whether voluntarily or involuntarily, used the same unnecessarily and is entitled to allowance therefor, and the question of duress or compulsion is taken entirely out of the case.

The Commissioner having declined to make any allowance, on the theory that the tax on export manifests being constitutional, the stamps in question were properly and necessarily affixed, the petitioner had a right under the Tucker Act to bring an action in the District Court for the refund, which, if the tax on export manifests was unconstitutional, had been improperly denied him by the Commissioner of Internal Revenue.

The cases of *United States* v. *American Tobacco Co.*, 166 U. S., 468, and *Medbury* v. *United States*, 173 U. S., 492, are distinct authorities in favor of such an action.

The former case, *United States* v. *American Tobacco Co.*, arose under Section 3426, which was formerly in force, and the wording of which was practically identical with that of the Act of May 12, 1900. The action was brought in the Court of Claims to recover the value of stamps which had been destroyed by fire, before they were used, the Commissioner of Internal Revenue having declined to make allowance for such stamps on the ground that they were insured and that claimant had been paid by the insurance companies. The court held that this was no ground for declining to redeem the stamps in question, and the judgment of the Court of Claims in favor of the plaintiff for the value of the stamps was sustained by the Supreme Court.

Similarly, in *Medbury* v. *United States* (*supra*), it was held that the Court of Claims had jurisdiction of an action, if the Secretary of the Interior failed, in accordance with the Act of June 16, 1880, to refund the excess of $1.25 to parties who had paid double the minimum price for land which was afterwards found not to be within the limits of a railroad land grant.

The Court said:

> " Although the right to recover back the
> " excess of payment in this proceeding is based
> " upon the statute of 1880, we do not think it
> " comes within the principle of those cases

" which hold that where a liability and a
" remedy are created by the same statute, the
" remedy so provided is special and exclusive.
" In this case, it is not a right and remedy
" created by the same statute. The statute
" creates the right to have a repayment under
" the facts therein stated, but it gives no
" remedy for a refusal on the part of the Secre-
" tary to comply with its provisions. * * *
" A right of repayment of money thereto-
" fore paid has been given by the act, but it
" is only under the act that the right exists
" and that right is to have the secretary in a
" proper case issue his warrant in payment of
" the claim, and until he refuses to do so, no
" wrong is done and no case for a remedy is
" presented. After the refusal, the question
" then arises as to the remedy, and you look
" in vain for any in the act itself. We can-
" not suppose that Congress intended in such
" case to make the decision of the Secretary
" final when it was made on undisputed facts.
" If not, then there is a remedy in the Court
" of Claims, for none is given in the act which
" creates the right. The procedure for ob-
" taining the repayment as provided for in
" the act must be followed, and when the ap-
" plication is erroneously refused, the party
" wronged has his remedy, but that remedy
" is not furnished by the same statute which
" gives him the right."

In the case at bar, the Act of May 12, 1900, gives the right to a refund where stamps through mistake have been improperly or unnecessarily used, or where the duties represented thereby have been paid in error or in any manner wrongfully collected, and directs the Commissioner of Internal Revenue to make allowance for such stamps. The statute gives this right without any question of duress or protest in connection with the payment of the duties represented by such stamps. The Commissioner, erroneously assuming that the act imposing a tax on export manifests was constitutional, denied the petitioner's application, and the petitioner may therefore enforce by an action under the Tucker Act the right given it by the Act of May 12, 1900.

POINT IV.

The demurrer to the petition should be overruled and the judgment of the District Court affirmed.

Dated New York, January 9th, 1906.

WILLIAM EDMOND CURTIS,
For Defendant in Error.

JOHN G. CARLISLE,
Of Counsel.